

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of

**Definition of the Rural Service
Areas of Two Rural Telephone
Companies in the State of Colorado**

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CC Docket No. 96-45

COMMENTS OF DELTA COUNTY TELE-COMM, INC.

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Delta County Tele-Comm, Inc., (Delta County), by its attorneys, submits these comments in response to the Commission's Public Notice requesting comments in this consolidated proceeding.¹ This proceeding concerns two Colorado Public Service Commission (CPUC) petitions seeking agreement to plans to partition two rural telephone company study areas into wire-center-based service areas. Delta County is a "rural telephone company" (rural carrier) under the Telecommunications Act of 1996,² that provides universal services for 10,622 access lines spread throughout its 1,540-square-mile study area, despite the low density and consequent high costs of service.

A. Introduction and Summary

This proceeding has grown out of the Colorado Public Utilities Commission's (CPUC's) petition to carve the Delta County Tele-Comm, Inc. (Delta County) and CenturyTel of Eagle Inc. (Eagle) study areas in Colorado into new wire-center-based service areas.³ The CPUC plans to

¹ Public Notice, "Pleading Cycle Established For Comments On Proceeding Regarding The Definition Of The Rural Service Areas Of Two Rural Telephone Companies In The State Of Colorado," DA 03-26, CC Docket No. 96-45 (January 7, 2003).

² 47 USC §154 (37).

³ Petition by the Colorado Public Utilities Commission, Pursuant to 47 C.F.R. § 54.207(c), for Commission Agreement in Redefining the Service Area of Delta County Tele-Comm, Inc., a Rural Telephone Company, CC

partition the study areas to match the rural carriers' service areas to the wire center cost units in their support disaggregation plans under §54.315(d) of the Commission's Rules. The Wireless Competition Bureau has invoked the rule that such petitions are deemed granted by the Commission if 90 days pass without action after public notice is given, and Eagle has challenged that disposition.⁴

There is also a consolidated proceeding regarding an application for review of two cases involving Alabama wireless "eligible telecommunications carrier" (ETC) designations that is on a parallel track with this one.⁵ That proceeding also raises service area redefinition issues that are closely related to the questions at issue here.⁶ Other service area disputes are emerging and will accelerate as wireless carriers line up to seek designation, service area changes and support.⁷

Delta County will not restate in detail the showing in its comments on the CPUC petition here. It incorporates by reference its own comments, joined by the Colorado Telecommunications Association, and requests that the Commission also consider the comments of the National Telecommunications Cooperative Association and the Organization for the Promotion and Advancement of Small Telecommunications Companies, in the first phase of this proceeding, and the comments of National Rural Telecom Association (NRTA) and the Organization for the Promotion and Advancement of Small Telecommunications Companies

Docket No. 96-45, filed on August 12, 2002 (Delta County Petition); see, also, Petition by the Colorado Public Utilities Commission, Pursuant to 47 C.F.R. § 54.207(c), for Commission Agreement in Redefining the Service Area of CenturyTel of Eagle, Inc., A Rural Telephone Company, CC Docket No. 96-45, filed on August 6, 2002).

⁴ Application for Review, or Alternatively, Petition for Reconsideration of CenturyTel of Eagle, Inc., CC Docket No. 96-45, filed on December 17, 2002.

⁵ Application for Review of the Alabama Rural Local Exchange Carriers in CC Docket No. 96-45, DA 02-746, DA 02-3181, filed on December 23, 2002; Application for Review of the Alabama Rural Local Exchange Carriers in CC Docket No. 96-45, DA 02-1465, DA 02-3317, filed on December 30, 2002 (collectively, Applications for Review).

⁶ For example, the Wireline Competition Bureau (WCB) has asked the Alabama commission to agree to study area partitioning to ensure support payments to wireless carriers in rural carrier areas where they are already competing and for lines they are already serving, as it did here.

⁷ See, e.g., United States Cellular Corporation, Petition for Waiver – Expedited Action Requested, n. 4, filed January 15, 2003 (stating intention to file for service area waivers separately).

(OPASTCO), as well as the National Telecommunications Cooperative Association filed in the Eagle redefinition proceeding.

Delta County will discuss primarily the plan to disaggregate its own study area and the broader issues it implicates. Most importantly, there is a Joint Board proceeding actively considering what modifications may be necessary to respond to changed circumstances – including the rapid and accelerating growth of the universal service funding requirements and experience in applying the rules adopted when §214 was first implemented.⁸ Accordingly, the Commission can best handle the significant concerns with the current operation of its portability and designation rules by adding the Alabama proceedings to this consolidated case. It should then adopt an interim plan to deal with service area changes and ETC designations while the Joint Board and Commission deal with the referred issues.⁹

As Delta County explains why the CPUC petition should be denied or at least suspended until the Portability Proceeding has been completed, it will become apparent that the Commission's reassessment of the current rules and policies is both overdue and sorely needed. The Commission should, while its rulemaking is underway, use interim standards to test every service area redefinition and designation issue it confronts in the light of the governing statute and the intent of Congress.

The record compiled in response to the CPUC's petitions seeking to partition the Delta County and Eagle study areas into separate service areas for every wire center demonstrates that the plan is inconsistent with §214(e) and the Commission's rules and the Commission may not lawfully agree to the new service area definitions. The CPUC's claim that redefinitions will

increase competition is wrong because wireless carriers already serve in the parts of the Delta County study area where they are licensed. The CPUC has sought to exclude discussion of

⁸ Federal-State Joint Board on Universal Service, CC Docket No. 96-45, FCC 02-301 (rel. Nov. 8, 2002) (Portability Proceeding).

⁹ To avoid actions which prejudice or impede the Joint Board's deliberations, further balloon universal service funding and clash with the statute, the Commission should suspend the orders in the Eagle and Alabama cases at least until it has adopted an interim approach.

designation and eligibility from the service area evaluation, but the law and Commission statements show they are inextricably tied together. In any event, redefining service areas by itself has no impact on competition; it simply funnels nationwide ratepayers' money to wireless carriers for services they already provide. The language of the statute leaves no rational doubt that designations in rural carrier areas are an exception to any presumption that competition and competitive neutrality must prevail where the costs outweigh the benefits. The legislative history shows that the Senators who authored and secured passage of §214(e)(2) and (5) were concerned exclusively with preventing subsidized competition that could jeopardize rural customers and carriers. When the Commission adopted its rules, it spoke of the danger of study area averaging of costs and rates, which is helped buy by no means cured by support disaggregation.

The Commission must take into account both past and "future" Joint Board recommendations. The controlling recommendation will be that of the Joint Board looking at the precise issues raised in these service area cases and the closely related Alabama service area and ETC designation review proceeding. Changes in the marketplace led to that referral and a majority of the Commissioners have voiced serious doubts about the preference for competitors and the lack of adequate public interest scrutiny before added ETCs are given access to support. Accordingly, the Commission should suspend these and other matters raising these issues to await answers to crucial questions like the proper measure of support, standards for designation and impact of support disaggregation. Analysts are touting support as a key to adding wireless profits, and grants while the Joint Board considers changes will distort incentives and squander national end user support money with no countervailing benefits. If the Commission does not await the Joint Board's recommendation, it must adopt interim procedures to protect the Joint Board's and the Commission's ability to make needed changes and to prevent unwarranted

reliance. At the very least, it should condition any service area redefinitions or additional ETC designations on the outcome of the pending Joint Board portability review. To use everyone's limited resources efficiently, the Commission should consolidate the Alabama cases with this to formulate the proper interim standards. The Commission should also repeal or rewrite §54.207 to ensure separate FCC review of service area changes and discussion of the Joint Board recommendations. It should also broaden its referral to the Joint Board to include review, for example, of how to induce states to shoulder their share of the support for the additional ETCs they designate under the "public interest" standard.

The Commission should deny the CPUC proposal to carve up Delta County's study area, wait for the Joint Board or fashion strict statute-driven interim standards and conditional changes, at most. The Portability Proceeding is the required venue for resolving the host of open portability issues and correcting the former Commission's foray into "pro-competitor industrial policy" instead of the rural safeguards Congress adopted.

B. The CPUC Has Not Justified Its Plan to Redefine Delta County's Study Area as Six Wire-Center-Based Service Areas to Funnel More Federal Support to Colorado Wireless Carriers for Competing Where They Already Provide Service

Briefly, the CPUC has proposed to partition the Delta County and Eagle study areas into six and 53 service areas, respectively. The CPUC acted pursuant to its rule that a rural carrier's study area must be broken into wire center service areas when an incumbent disaggregates its universal service support under Path 3 of §54.315(d) of the Commission's rules.¹⁰ The CPUC adopted both its rule and service area modification plan solely to facilitate competition against the rural telephone companies by guaranteeing support to wireless carriers serving only part of such incumbent ETCs' service areas in Colorado. In its reply comments, the CPUC states its basis plainly: "Redefining Delta's service area would promote competitive entry." (p.2) and "the

fundamental purpose of its Petition is to promote competition by eliminating an unreasonable barrier to entry in Delta's service area" (p. 4). In the CPUC reply comments, it further "affirms its conclusion that disaggregating Delta's service to the wire center level is in the public interest in light of the "pro-competitive goals of the Act and Commission rules" (*ibid.*). As to the impact of service area redefinition, CPUC contends (p.4) that disaggregating support removes any concerns about "cream skimming."

CPUC is wrong as a matter of fact, policy and law. These comments will highlight the two paramount reasons for the Commission to deny the CPUC petitions and adopt interim standards that comport with §214(e) and the intent of Congress.

1. Fragmenting Delta County's Study Area Does Not Increase Competition

First, there is no conceivable basis for claiming that redefining Delta County's service area will increase competitive choices for any customer. Wireless carriers already serve the customers in their licensed areas, and thus are already competing with the incumbent ETCs in those areas. Reducing the requirement to serve the incumbent's whole study area removes even the use of resale to extend choices to more customers – thereby reducing competition compared to what §214(e) requires. The Commission has pointed out that resale, mentioned in §214(e)(1), allows wireless carriers to serve throughout a rural carrier's study area.¹¹

The CPUC contends that competition will increase, although that result would, of course, require designation. The CPUC reply comments inconsistently contend (pp. 9-10) that Delta County cannot raise designation issues because they are not within the scope of the service area redefinition question. The CPUC's arguments illustrate that the service area and designation

¹⁰ The rule permits a one-time, four-year disaggregation and targeting of a carrier's universal service support.

¹¹ Federal-State Joint Board On Universal Service, 12 FCC Rcd 8776, ¶ 189 (1997) (stating that a wireless carrier "could supplement its facilities-based service with service provided via resale").

issues are inextricably intertwined. The Bureau so observed in the Washington State service area case,¹² where both the competitors and the incumbents supported service area disaggregation. From the outset, the Commission has expected that states would address service area change issues in the context of a designation public interest evaluation.¹³ This is not surprising because the service area definition provision itself merely defines one necessary term in the designation process. In any event, there has not been a request for designation as an ETC in Delta County's study area, although there are CLECs serving customers wherever wireless providers overlap its study area right now. Establishing or extending competition is simply not a factual basis for partitioning Delta County's study area. Indeed, assuming one or more requests by wireless providers and state designation, as does the CPUC's competition goal, the only immediate result of service area redefinition will be to funnel federal support money, collected from end user customers throughout the country, to wireless carriers for providing the same service they provide now. Thus, the costs manifestly exceed the benefits.

2. Carving Up Delta County's Study Area to Provide Federal Support to Foster or Reward Competition Conflicts with the Plain Language of §214(e) and the Intent of Congress

As noted, in furtherance of its ostensible goal of stimulating competition, the CPUC held that authorizing duplicative support and service area redefinition to avoid the statutory requirement that additional ETCs must offer universal service throughout the incumbent's study

¹² Petition for Agreement with Designation of Rural Company Eligible Telecommunications Carrier Service Areas and for Approval of the Use of Disaggregation of Study Areas for the Purpose of Distributing Portable Federal Universal Service Support 15 FCC Rcd 9921, ¶7 (CCB, September 9, 1999) ("[T]he request for disaggregated study area support is inextricably intertwined with the request for agreement with the Washington Commission's proposed designation of the individual exchanges of the fifteen rural carriers as service areas").

¹³ Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, ¶190(1997) (First Report and Order) ("We note that state commissions must make a special finding that the designation is in the public interest in order to designate more than one eligible carrier in a rural service area, and we anticipate that state commissions will be able to consider the issue of contiguous service areas as they make such special findings " (footnote omitted)).

area will be "competitively neutral" and will remove lack of support as a "barrier to entry."¹⁴

And, in reply comments, the CPUC scoffed (p. 3) at Delta County's demonstration that the statute does not apply the supposed presumption of competition to rural areas. However, Delta County's comments spelled out the statutory imperative to treat entry and support in rural carrier areas differently. Tellingly, the CPUC can point to no statutory or legislative history evidence against that showing or conclusion.

The legislative history demonstrates that the authors of the law on designating additional carriers were focused exclusively on preventing harm for existing providers in rural areas and their customers. For example, when the Senate met on February 1, 1996, under a Unanimous-Consent Agreement, to consider the bill that emerged from the Conference Committee, Senator Hollings urged passage. His justification was, in part, that the conference version of the bill both "promotes competition [and] retains strong protections for universal service and rural telephone companies."¹⁵ His analysis of the bill's important provisions reaffirmed that "[s]pecial provisions in the legislation address universal service in rural areas to guarantee that harm to universal service is avoided there."¹⁶ The attached list of Telecommunications Bill Resolved Issues he provided was even more explicit, with an entry that reported

Rural Telephone Company Protections: States may protect rural telephone companies from competition; only essential carriers will be eligible to receive universal service support.¹⁷

Senator Dorgan, one of the principal architects of the universal service sections, spelled out the intent of the section on designating additional eligible telecommunications carriers (ETCs) to obtain support in rural telephone company service areas. When the Senate precursor

¹⁴ Again, it is hard to fathom the barrier to entry posed to a carrier that is already competing in the areas for which it seeks redefinition.

¹⁵ 142 Cong. Rec. S687 (Feb. 1, 1996).

¹⁶ *Id.*, at S688.

bill was debated on the Senate floor, he consistently stressed the need for the bill's different rural policy. On March 21, 1995, he laid the basis for the rural distinction vis à vis competition, making the important point that the law does not wholly ban competition, but instead conditions it:

That's what we really need to focus on today. Rural areas are different. This does not suggest that competition should be rejected for rural areas. Rather, we need to understand that competition in rural and high cost markets needs to be structured differently in rural areas. Universal service support is critical and the introduction of competition must be addressed with carefully constructed policy--not blind obedience to competition and deregulation.¹⁸

On June 8, 1995, Senator Dorgan again cautioned that "Competition works in some cases to an advantage of certain consumers. In other cases, it does not."¹⁹ He illustrated the concern that, if selective competitors "bring telephone needs to [a chosen] town and take the business away from the existing service carrier, the rest of the services would be far too expensive and the whole system collapses."²⁰ He went on to explain:

For that reason, in this legislation we described a condition in which, if someone comes in and decides to serve in one of those areas, one of the conditions is that they would have to serve the entire area. They would be required to serve the entire area as a condition of receiving these support payments from the universal service fund.²¹

Throughout the debate on the legislation, Senator Dorgan championed sufficient state public interest findings before designation of additional carriers because customers not served by a competitor serving only part of a rural carrier's study area would not be benefited and could be harmed. He emphasized that "the chant of competition is not a chant that will be heard in the rural reaches of our country. We are simply not going to see company after company line up to

¹⁷ Id., at S689.

¹⁸ 141 Cong. Rec. S. 4210 (March 21, 1995).

¹⁹ 141 Cong. Rec. S. 7948 (June 8, 1995).

²⁰ Ibid.

compete for local service in many rural areas."²² Thus, he concluded that "we need to make certain that the kind of telephone service that exists in rural counties will be the kind of telephone service that brings them the same opportunity as others in the country will be provided."²³

Neither the 1996 Act nor its legislative history contains anything to support the notion that Congress meant to stimulate competitors to seek support in rural telephone company service areas or that the Commission or the states were meant to ignore the rural safeguards in the name of competition or "competitive neutrality." Thus, the CPUC, misled by the "blind obedience to competition and deregulation" of an earlier Commission, has interpreted §214(e) precisely the opposite of the way Congress intended.

A similar disparity between what the statute requires and how the implementing Commission preferred to read it was judicially corrected in Iowa Utilities Board v. FCC, 219 F3d 744 (8th Cir. 2000). There the Commission had adopted rules designed to weaken the rural exemption from the extreme pro-competitive requirements of §251(c). The court struck down the interpretation of one of the statutory standards, pointing out that: "the FCC has unreasonably interpreted the phrase "unduly economically burdensome" and that "Congress sought both to promote competition and to protect rural telephone companies as evidenced by the congressional debates. See 142 Cong Rec S687-01 (Feb. 1, 1996) (statements by Sen. Hollings and Sen. Burns); 142 Cong Rec H1145-06 (Feb. 1, 1996) (statement by Rep. Orton)." While Congress intends the benefits of competition for all, the court held, the Commission could not read the specified rural safeguards out of the law.

²¹ Ibid.

²² Ibid.

²³ Ibid.

The same is true here. Section §214(e)(2) provides that a state commission only has authority to "designate more than one common carrier as an eligible telecommunications carrier for a service area designated by the State commission, so long as each additional requesting carrier meets the requirements of paragraph (1) ... in the case of an area served by a rural telephone company" and if the State commission first "find[s] that the designation is in the public interest." The CPUC cannot rationally read this authority to permit designation of a carrier that does not meet the paragraph (1) requirement. By the same token, the plain language of the law cannot be read to permit state designation of a service area inconsistent with the study area definition in §214(e)(5), which is necessary to understand this section, and the resulting study-area-wide service requirement. Congress cannot have meant to allow a standardless manipulation of a rural carrier's service area to relieve additional carriers of the fundamental requirement to serve throughout the rural carrier's study area – for the reasons Senator Dorgan stated so clearly – as a prerequisite to obtaining support. And, given the statutory language and the legislative history of §214(e), it is beyond question that the CPUC's "public interest" finding that the redefinition or designation will increase competition, reward existing competition or achieve "competitive neutrality" is not an adequate justification for rewriting the eligibility requirements.

The CPUC also makes much of its contention that support disaggregation resolves the problem of cream skimming based on universal service support. But cream skimming based on support averaging, which no one denies is at least mitigated by support deaveraging, is not the only impact of changing Delta County's study area that the CPUC should have examined. For one thing, the CPUC should have looked at adverse customer and rural carrier impacts, such as the disincentive to invest in rural infrastructure when another competing carrier is receiving

support without meaningful responsibilities in a market with a limited customer base to defray even one carrier's costs

3. Disaggregating Support Is Beneficial in Discouraging Support Arbitrage, But It Does Not Rectify the Larger Cherry-Picking and Arbitrage Problems Caused by Rural Carriers' Study-Area Wide Averaging for All Other Costs and Rates

CPUC insists (Reply Comments, pp. 2-3) that support disaggregation entirely solves the problem of cream skimming. The CPUC is seriously mistaken. Universal service support for high cost areas is calculated based on a rural company's study area wide costs, to be sure. But universal service support reimburses only a fraction of a company's high costs. Delta County must average its local rates pursuant to state law, and §69.3(e)(7) of the Commission's rules require it to offer study-area-wide averaged access rates. Thus, even when support has been aligned more closely with costs in different wire centers or zones, the incumbent carriers end user and carrier charges will not be based on deaveraged costs. The implementing Joint Board and Commission expressly recognized that study area cost and rate averaging invite cream skimming unless the study-area-wide service mandate in the designation provisions is enforced.

The Commission stated:

We agree with the Joint Board that, at this time, retaining the study areas of rural telephone companies as the rural service areas is consistent with section 214(e)(5) and the policy objectives underlying section 254. We agree with the Joint Board that, if competitors, as a condition of eligibility, must provide services throughout a rural telephone company's study area, the competitors will not be able to target only the customers that are the least expensive to serve and thus undercut the ILEC's ability to provide service throughout the area. In addition, we agree with the Joint Board that this decision is consistent with our decision to use a rural ILEC's embedded costs to determine, at least initially, that company's costs of providing universal service because rural telephone companies currently average such costs at the study-area level.²⁴

²⁴ May 9 order ¶ 189 (footnotes omitted).

The same concerns continue today; and the Commission should continue to apply the statutory requirement for an additional ETC to provide service throughout the incumbent ETC's study area.

C. The Joint Board Recommendation Which the CPUC and this Commission Must "Take into Account" Is the One that Will Be Issued by the Current Joint Board Charged with the Very Issues Raised Here and in the Alabama Designation Cases

1. The Joint Board is Currently Considering What Recommendations to Make on the Very Issues Presented Here and in the Alabama Cases

The inseverable service area and designation issues²⁵ that have arisen since the original implementation of §214(e) have, in recent months, contributed to the growing crisis in universal service support costs and sustainability. The Commission has recognized the mounting problem and has prudently set in motion proceedings to reassess portability and designation issues, including changes in service area definition to accommodate carriers unwilling to shoulder the statutory requirements for universal service support. However, if the infirmities in current practice are left unchecked, even during the period of Joint Board and Commission re-evaluation, the patient – universal service funding as Congress intended it – could be dead before the cure is developed.

Section 214(e)(5) provides that, for an area served by a rural telephone company, its "service area" is defined as its "'study area' unless and until the Commission and the States, after taking into account the recommendations of a Federal-State Joint Board instituted under section 410(c), establish a different definition of service area for such company." The Universal Service Order fully understood the implications of this requirement, saying (§187):

We conclude that the plain language of section 214(e)(5) dictates that neither the Commission nor the states may act alone to alter the definition of service areas served by rural carriers. In addition, we conclude that the language "taking into account" indicates that the Commission and the states must each give full

²⁵ See notes 12 and 13 and accompanying text, *supra*.

consideration to the Joint Board's recommendation and must each explain why they are not adopting the recommendations included in the most recent Recommended Decision or the recommendations of any future Joint Board convened to provide recommendations with respect to federal universal service support mechanisms. (emphasis added)

The Commission has convened a Joint Board for precisely that purpose, but neither the CPUC nor the Commission's notice concerning this consolidated proceeding explained why it was ignoring this "future Joint Board" poised to "provide recommendations with respect to federal universal service support mechanisms." The Commission initiated the Joint Board process because, "[s]ince adoption of these rules in 1997, there have been many changes in the telecommunications marketplace" and "[a]s competitive ETCs enter new markets and expand services, they are increasingly qualifying for high-cost universal service support," increasing the size and rate of growth of universal service funding.²⁶

In convening this directly relevant Joint Board, the Commission generally instructed it to "seek public comment on whether these rules continue to fulfill their intended purposes, and whether modifications are warranted in light of developments in the telecommunications marketplace."²⁷ However, the Commission also specifically asked the Joint Board to look at "the process for designating ETCs,"²⁸ "the Commission's rules relating to support in competitive study areas,"²⁹ "the methodology for calculating support for ETCs in competitive study areas,"³⁰ "the rules governing calculation of high-cost support for competitive ETCs utilizing UNEs,"³¹ "the system for resolving requests for ETC designations under section 214(e)(2) of the Act,"³² "whether it is advisable to establish federal processing guidelines for ETC applications, and if so,

²⁶ In the Matter of Federal-State Joint Board on Universal Service, CC Docket No. 96-45, FCC 02-307, p.4 (Rel. November 8, 2002) (Portability Proceeding).

²⁷ Id., ¶1.

²⁸ Id., ¶¶1, 6.

²⁹ Id., ¶6.

³⁰ Id., ¶7.

³¹ Ibid.

what should be included in such guidelines"³³ and "whether the Commission should provide additional guidance regarding the manner in which the level of disaggregation of support should be considered, and if so, what guidance the Commission should provide."³⁴

2. Unless the Commission Awaits the Joint Board's Recommendations, It Should Adopt or Ask the Joint Board to Recommend an Interim Approach to Service Area Changes and ETC Designations

These, of course, are the very questions that are raised by this consolidated proceeding and the reconsideration proceedings for the Alabama designations and service area change plan. These are also the questions left unanswered by the last Joint Board proceeding. The Commission should wait until it can "take into account" the recommendations of this Joint Board, as the law requires.

If it is unwilling to wait, the Commission should adopt or ask the Joint Board to recommend an interim approach or, at the very least, it should condition any actions taken while the Portability Proceeding is pending on the outcome of that proceeding. Since, instead, the Bureau are granting requests unconditionally on the basis that the Portability Proceeding issues are beyond the scope of interim requests,³⁵ immediate interim action is necessary to preserve the questions before the Joint Board for its decision. The interim approach should either preserve the status quo or make it clear that any interim service area change or additional ETC designation is conditioned on consideration of the Joint Board recommendations and conformance with the Commission's decision on the recommendations.³⁶

³² Id., ¶10.

³³ Ibid.

³⁴ Ibid.

³⁵ See, e.g., Federal-State Joint Board on Universal Service; RCC Holdings, Inc. Petition for Designation as an Eligible Telecommunications Carrier Throughout its Licensed Service Area in the State of Alabama, CC Docket No. 96-45, DA 02-3181, Memorandum Opinion and Order, ¶3 (Wireline Comp. Bur. rel. Nov. 27, 2002).

³⁶ The similarity of the Delta County and Eagle issues and the notably different treatment thus far provide additional reasons why the Commission should suspend the effectiveness of the Eagle service area changes, especially since the record plainly establishes that summary grant by failure to act does not comport with law.

The Commission has routinely taken such measures, for example, to preserve its own and the Joint Board's ability to decide and prevent excessive changes during the pendency of a proceeding. It adopted an interim freeze in the Joint Board proceeding that ultimately abandoned the Subscriber Plant Factor (SPF), to prevent the continuation of the factor's rapid growth.³⁷ It adopted the current cap on the growth of high cost loop support to control growth during universal service review proceedings.³⁸ It adopted a freeze on allocation factors frozen as an interim measure to prevent growing cost shifts due to Internet traffic while the Separations Joint Board completed its work.³⁹ The Commission adopted an interim method for determining carrier contributions to the universal service fund while it looks further at longer term modifications.⁴⁰ And, the Commission has "routinely" conditioned certain actions taken while a rulemaking proceeding is pending to ensure that the policy or rules it adopts will be applied.⁴¹

Preserving the Joint Board and Commission options is not an idle goal. At least three Commissioners have raised serious questions about the proper relationship between support and competition and the commission's previous preference for competitors.

³⁷ The Commission adopted the 1982 freeze of the SPF factor to halt the growth in allocation of exchange plant costs to the interstate jurisdiction, while the Commission continued revision of the cost allocation procedures. Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, Decision and Order, CC Docket No. 80-286, 89 F.C.C.2d 1 (1982), *aff'd*, MCI Telecommunications Corp. v. FCC, 750 F.2d 135, 141 (D.C. Cir. 1984).

³⁸ Amendment of Part 36 of The Commission's Rules And Establishment of a Joint Board, 9 FCC Rcd 303 (1993).

³⁹ Jurisdictional Separations Reform and Referral to the Federal-State Joint Board, 15 FCC Rcd 13160, ¶13 (2000).

⁴⁰ Federal-State Joint Board on Universal Service, CC Docket No. 96-45 et al., FCC 02-329, Report and Order and Second Further Notice of Proposed Rulemaking (rel. December 12, 2002).

⁴¹ See, e.g., Application of RCA American Communications, Inc.; Alascom, Inc.; For authority to jointly construct and operate domestic satellite space stations and earth stations in connection with the provision of Alaskan communications services, 78 FCC 2d 359, ¶¶1,4 (1980)(reaffirming a condition "routinely applied to all common carrier facility authorizations since the court's decision in *MCI Telecommunications Corp. v. FCC* ...," which stated that "[t]he authority herein is granted explicitly subject to possible revocation or modification as a result of any findings, rules, or requirements or other actions which may result from or be promulgated by, the proceedings in Common Carrier Docket No. 78-72, "In the Matter of MTS and WATS Market Structure," FCC 78-144 (March 3, 1978)).

First, Chairman Powell has called into question the fundamental principle underlying initial implementation of the Telecommunications Act of 1996 that the Commission's role is to prefer and protect competitors. He has concluded that the time has come to change the former Commission's "pro-competitor industrial policy" designed to "create a competitive industry to compete in the local telecommunications market ... provide extraordinary advantages to competitive entrants in order to bring competition into being rapidly ... [and] protect new entrants from failure."⁴²

Second, Commissioner Martin has raised serious questions about "the Commission's policy – adopted long before this Order – of using universal support as a means of creating “competition” in high cost areas."⁴³ His fear is that "subsidiz[ing] multiple competitors to serve areas in which costs are prohibitively expensive for even one carrier ... may make it difficult for any one carrier to achieve the economies of scale necessary to serve all of the customers in a rural area, leading to inefficient and/or stranded investment and a ballooning universal service fund."⁴⁴

Third and most recently, Commissioner Adelstein stated his view that "[f]ederal support is intended to promote universal service, not to subsidize artificial competition – or, for that matter, to keep it at bay."⁴⁵ He further noted that "Congress gave the states well-defined and

⁴² Speech by Michael K. Powell at the Goldman Sachs Communicopia XI Conference, New York, NY (October 2, 2002), pp.3-4.

⁴³ Separate Statement of Commissioner Kevin J. Martin regarding Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers Federal-State Joint Board on Universal Service Access Charge Reform for Incumbent Local Exchange Carriers Subject to Rate-of-Return Regulation Prescribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers, 16 FCC Rcd 19613 (2001) (MAG Plan Order).

⁴⁴ Separate Statement of Commissioner Kevin J. Martin regarding Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers Federal-State Joint Board on Universal Service Access Charge Reform for Incumbent Local Exchange Carriers Subject to Rate-of-Return Regulation Prescribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers, 16 FCC Rcd 19613 (2001).

⁴⁵ All of the statements quoted from Commissioner Adelstein are from Rural America and the Promise of Tomorrow, his remarks to the NTCA Annual Meeting and Expo, p.3 (February 3, 2003).

important responsibilities as partners in achieving this balance," giving states "a key role in determining if a competitor is eligible for universal service support." However, he urged states to "take great care in doing this – greater care, in my opinion, than some have in the recent past ... [because] ... designation is critical to small carriers serving high-cost areas ... [a]nd ... a key factor in allocating limited – and shrinking – universal service funds." The new Commissioner voiced specific suggestions for state regulators:

I'm encouraging state commissioners to carefully consider the public interest when making their eligibility determinations, as is required by the Act. Specifically, states must make sure that the new market entrants receiving universal service meet all the obligations required by the Act. These include providing service throughout the service area and advertising its availability. They also need to consider whether the new service proposed is an enhancement or an upgrade to already existing or currently available service.

Another consideration is the effect it will have on the cost of providing service. As the fund grows, so does the level of contribution. We must ensure that the benefits that come from increasing the number of carriers we fund outweigh the burden of increasing contributions for consumers. The public interest also demands that regulators seriously consider whether a market can support more than one carrier with universal service. If not, then new designations shouldn't be given as a matter of course just because it appears they meet other qualifications.

Commissioner Adelstein's concerns, like Commissioner Martin's, parallel the concerns that motivated the Senators who won adoption of the universal service safeguards for rural carriers' study areas.

Consonant with the Commissioners' realization that, when the fund balloons, the burden rests on the nation's end user customers, who ultimately reimburse carriers that contribute pursuant to §254(e), there must be some brakes for the current explosion of new carrier claims. Consequently, an interim freeze would best serve the public interest while the Joint Board and the Commission reevaluate the current rules. In any event, interim service area changes and

additional ETC designations should be strictly held to the statute and intentions of Congress for universal service in rural telephone company areas.

3. The Commission Should Also Repeal or Set Interim Standards for Any Delegations of Authority to the Wireline Competition Bureau During the Joint Board Proceeding Considering Changes to the Current Rules and Policies

As Chairman Powell recognized, the policies and rules put in place in the initial implementation of the 1996 Act were aggressively pro-competitor and were adopted without experience of the operation of competition in the local exchange marketplace. Existing universal service policies for service area changes and ETC designations provide a good example of the substitution of the Act's general pro-competitive thrust for Congress's carefully tailored exceptions and safeguards in rural areas.⁴⁶ The Joint Board should look at exactly how this implementation history skewed the current universal rules for designations and service area changes.

Indeed, while designations of authority to the Commission's Bureaus are generally efficient and streamline the Commission's routine decision making, it is not appropriate to leave in place designations and standards which the Commissioners have determined need to be revisited because of changed circumstances. Indeed, the Commission's own rules carefully restrict delegations to actions that carry out settled policies: §0.291(a)(2) states that "[t]he Chief, Wireline Competition Bureau shall not have authority to act on any applications or requests which present novel questions of fact, law or policy which cannot be resolved under outstanding precedents and guidelines."

⁴⁶ See, e.g., §§251(f), 253(f?), 254(b)(3), 259 and §214(e)(2), (5).

Here, any former presumption of validity has been destroyed by the Commission's referral to the Joint Board because "there have been many changes in the telecommunications marketplace"⁴⁷ and several Commissioners the expressed profound misgivings.

Leaving policies in effect can create perverse incentives to obtain portable support quickly, before changes may be adopted. Continuing to apply rules under review can also promote reliance on revenue streams that may make it harder to discontinue windfall support. Policies resulting in distorted reciprocal compensation payments to CLECs, which the Commission has had great difficulty in undoing,⁴⁸ caused unjustified reliance, distorted marketplace incentives and even alleged abuse. Continuing to grant support and service area changes while the proper level and measurement of portable support, the associated responsibilities and the designation process are all up in the air can foster the same kind of carrier expectations and incentives that will impede the Joint Board in recommending and this Commission in adopting needed changes.

Without sound interim controls, growth in universal service funding must also be expected to surge in the near future. As support becomes available to their wireless competitors, wireless carriers in areas where the incumbent ILEC is receiving support now realize the competitive pressures and the lure of what is essentially free money. Moreover, since state commissions have the authority to designate carriers that will get federal support payments, there is a clear incentive for state regulators to maximize the funds flowing into their state's jurisdiction.

To those pressures there have recently been added the pressure from financial analysts for wireless carriers to boost their revenues with basically costless "high margin" support revenues.

⁴⁷ Portability Order, ¶4.

⁴⁸ See, e.g., WorldCom, Inc. v. Federal Communications Commission, 288 F3d 429 (D.C.Cir. 2002)

A report issued by Salomon Smith Barney on January 21, 2003, concluded that "USF is the single most important opportunity for rural wireless carriers to improve their return on capital."⁴⁹ The analyst report estimated that qualification by the three specified carriers covered by the study in all of their service areas that cover some or all of a high cost carrier's study area would amount to \$56 million, \$114 million and \$119 million. That amounts to a total of \$290 million in support for these three carriers alone when their support reaches what the report calls "full strength." The report also states the expectation that more carriers will follow Western Wireless's lead in seeking subsidies, and urges those that have not to do so. The report notes that the requests are often contested and that the regulatory treatment could change, in part because the analyst believes that the costs of wireless service are significantly lower than the incumbent costs that determine support levels.

A news report by the Seattle Times illustrates that qualifying for universal service support can have an immediate positive effect on stock prices. The article said that Western Wireless's stock rose from \$1.30 to \$6.79, or 15.7%, when Chief Executive John Stanton said the company was "qualified to receive about \$32 million a year in universal service funding."⁵⁰ Plainly, the analyst's enthusiasm and the market's reaction indicate growing pressure to seek support, as well as apparent widespread recognition that the support paid to wireless carriers goes to the bottom line and is not offset by using the funds to provide universal service.

4. The Commission Should Immediately Consolidate the Alabama Service Area and Designation Issues to Conserve the Commission's and Parties' Resources and Expedite Development and Adoption of an Interim Policy

⁴⁹ Salomon Smith Barney, Wireless Services – USF Subsidies May Sig. Improve Subscriber Economics for Rural Carriers, p. 1 (January 21, 2003).

⁵⁰ seattletimes.com, [Western Wireless investors buoyed by upbeat comments](http://seattletimes.com) (January 10, 2003). Perhaps based on a different time period, [Forbes.com](http://forbes.com) reported that the stock rose 20% from \$1.09 to \$6.48 after the announcement, with a midday peak of \$6.58.

The Commission must decide the procedures it should follow and whether to agree with the Colorado PUC's plan to carve up the Delta County and Eagle study areas in this consolidated proceeding. The discussion above and in Delta County's and other parties' comments cited above demonstrates that the CPUC has not justified the service area changes it has asked the Commission to endorse. The Commission's decision will become the precedent for many such proceedings. Thus, the Delta County and Eagle disputes raise issues that resonate beyond the merits of the Colorado service area proposals and Eagle's request for review or reconsideration. The Alabama cases for which Delta County urges consolidation also raise pressing questions for all competitive carriers drawing or considering qualifying for support.

In connection with establishing interim policies or rules, the Commission should also suspend and reevaluate its procedures for considering service area changes. Its own interpretation of §214(e)(5) requires an explanation of how it has taken Joint Board recommendations into account.⁵¹ When there is a contested record before the Commission raising material questions of fact, law and policy, which include issues about the meaning of Joint Board precedents and about what Joint Board must be taken into account, the Commission should follow the precedent set in the Delta County matter and open a proceeding or, at least, issue a written decision. The Commission responsibly fulfills its duty in the statutory state-federal "check and balance" system for reviewing state-suggested changes in rural carriers' service areas by specifically considering and adopting a reasoned decision disposing of all contested issues. Delta County supports Eagle's requests for review and suspension of the Wireless Competition Bureau's agreement to the CPUC service area redefinition for Eagle by 90 days of inaction, despite the record showing disputes of fact, law and policy,. The Bureau correctly opened a proceeding for the Delta County service area. However, Delta County

believes the record demonstrates that the Commission's rule for considering state service area redefinition conflicts with §214(e)(1), (2) and (5).⁵² The Commission should repeal or modify the rule in this rulemaking docket to comport with the requirement that the Commission must "take into account" relevant Joint Board recommendations and explain its decision.

D. Conclusion

The Commission has the opportunity here, in this phase of CC Docket No. 96-45 – and in the parallel phase of this docket concerning ETC designations and service area changes in Alabama – to move forward significantly in its efforts to reevaluate and change its policies and rules for service area changes and ETC designations. To be sure, the focus of that more comprehensive reevaluation project is in the Joint Board proceeding at present. However, it is clear that the existing policies can no longer be regarded as established and well-founded in the law.

Accordingly, Delta County respectfully urges the Commission to:

1. Either determine that the CPUC has failed to justify study area redefinition and fragmentation into wire-center-based service areas for Delta County or Eagle or defer any grant and implementation until the actions requested below are completed;
2. Consolidate the record and the issues before it in this proceeding and in the two Alabama designation and service area redefinition proceedings before it for review and either reverse those decisions or defer implementation until the actions requested below are completed;
3. Adopt and, where appropriate, request Joint Board recommendations to assist it in adopting interim procedures and standards to govern all service area change proposals and ETC designations during the completion of the Portability Proceeding, including freezes or conditional grants to prevent excessive growth in support for CETCs;
4. Repeal or modify §504.207 to comport with §214(e); and

⁵¹ See pages 15-16, *supra*.

⁵² See, e.g., Delta County's December 23, 2003 ex parte report and attached explanation.

4. Revoke or set new interim standards for the authority delegated to the WCB with regard to all questions that the Commission has referred to the Joint Board.⁵³

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February 6, 2003

⁵³ The Commission should also add to its Joint Board referral such issues as how states should demonstrate that they will bear their share of the dual support responsibility for the additional carriers they designate, what impact designation and service area change decisions will have on the size of federal support funding and the countervailing benefits in rural areas and for the nation's end user customers, what obligations states may place on the additional carriers they designate and the many additional issues that will arise once the prior Commission's "pro-competitor industrial policy" is reexamined in the various contexts in which it was applied.

CERTIFICATE OF SERVICE

I, Vicki Redman, of Holland & Knight LLP, 2099 Pennsylvania Ave., NW, Suite 100, Washington, DC 20006, do hereby certify that a copy of the Comments Of Delta County Tele-Comm, Inc., was sent on this 6th day of February, 2003, via hand delivery or by first class mail, to the following parties:

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